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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. EDWIN CALDERON, Defendant and Appellant.	2d Crim. No. B215889 (Super. Ct. No. BA332856) (Los Angeles County)

Edwin Calderon was convicted by jury of simple assault, a misdemeanor (count 1, Penal Code, § 240); felony corporal injury to a spouse/cohabitant/child's parent (count 2, § 273.5, subd. (a)); and felony dissuading a witness from reporting a crime (count 3, § 136.1, subd. (b)(1)).[1] The jury found not true the special allegation that appellant was armed with a knife during the commission of count 2. (§ 12022, subd. (b)(1).) The court dismissed the knife use allegation pursuant to section 1118.1 as to count 3.

The court sentenced appellant to 180 days in county jail on count 1, with 180 days credit for time served. As to counts 2 and 3, the court suspended

[1] All further statutory references are to the Penal Code unless otherwise stated.

imposition of sentence and placed appellant on three years formal probation with the condition that he serve 216 days in county jail with 216 days credit for time served.

Appellant was ordered to perform 40 hours of community service, with credit for service already performed in county jail, and to complete a 52-week domestic violence program. He was served with a protective order and ordered to stay away from the victim. Appellant argues that the statute governing victim dissuasion is inapplicable; the prosecutor improperly referred to the knife use in closing argument; and the trial court erred in admitting the victim's prior statements. We affirm.

FACTS

Appellant and Rosa, along with their six-month-old daughter, lived together in Los Angeles County. At about 11:00 p.m., on November 16, 2007, appellant assaulted Rosa in their apartment. She testified that he was angry because she had been seen with another man.

Several days after the offense, Rosa was interviewed by Detective Juan Campos. She told him that appellant grabbed her cell phone and broke it, saying, "'This is so you don't fuck[ing] call the police.'" He threw her on the bed, straddled her, and grabbed her throat so hard that she could not breathe. He punched her in the head and face several times. She screamed for help and appellant grabbed a knife and held it to her throat. She tried to push the knife away and was cut in the webbing between her middle and index fingers. Appellant grabbed her by both wrists and squeezed them until her hands became numb. Rosa was able to free herself and ran into the hallway. She saw another tenant and asked him to call 911. When the police responded, appellant had left the apartment.

Rosa reported to Campos that she had blood on her nose and mouth when she escaped from appellant. She said there had been previous incidents of

domestic violence, but she did not call the police because appellant had threatened harm to her five-year-old son who lived in El Salvador. Campos took photographs of Rosa's bruised nose and bruising inside her mouth. She reported difficulty opening her jaw and eating. Additional photographs showed bruising on her wrists and ear. Rosa told Campos that her facial injuries were caused by appellant punching her in the face. Another photograph showed a cut between Rosa's index and middle finger.

Testimony of Officer McInnis

Officer Kyle McInnis responded to Rosa's apartment on November 16, 2007. Rosa spoke only Spanish and McInnis spoke only English, so he contacted another officer to translate. Through the translating officer, Rosa told McInnis that appellant entered their apartment and picked up her cell phone from a table and broke it. He said it was to prevent her from calling the police. Appellant threw Rosa down on the bed and began punching her in the face. He grabbed a knife, held it against her neck and continued punching her. She begged him to stop so she could put the baby to bed. He eventually stopped and left the apartment.

Rosa's Trial Testimony

Rosa testified that she could not remember how she sustained the injuries depicted in the photographs admitted into evidence. She acknowledged talking to Detective Campos several days after the offense, but denied making the statements contained in his report. Rosa did not recall telling Campos that she was afraid to call the police or that appellant had previously threatened harm to her son.

It was Rosa's testimony that appellant grabbed her wrists, bruising them, then grabbed her shoulders, and threw her to the bed. She called out for help, but appellant covered her mouth with his hands, injuring her lips. She

could smell alcohol on his breath. He then began choking her around the neck, bruising her. Appellant removed his hands and Rosa fled.

Rosa also testified that she had not been injured. She did not remember being punched in the face. She said that she received a cut, but did not remember how. She did not recall if she had a bloody nose, but she did have bruised wrists. She did not remember telling officer McInnis that appellant grabbed her cell phone and broke it, or that appellant grabbed her by the throat and punched her in the face. She did not remember saying that appellant held a knife to her neck.

In February 2008, appellant and Rosa moved to the state of Washington with their daughter. Rosa gave birth to their second daughter in September. Rosa testified that she currently lives with appellant and was brought to Los Angeles "by force" for his trial. She does not want him prosecuted.

Evidence of Knife and Broken Cell Phone

When McInnis arrived at Rosa's apartment, she showed him a broken cell phone, but he did not book it into evidence or mention it in his report. No one took pictures of the phone. Rosa did not show McInnis a knife. McInnis saw a cut between Rosa's fingers where the skin had been broken. Another officer photographed injuries to Rosa's face, neck, lip, and thigh. On cross-examination, Detective Campos testified that Rosa did not show him a cell phone or a knife, nor did he ask to see either. She did not explain how appellant obtained the knife or what type of knife it was. Campos did not recall if he saw a cut on her hand. He remembered seeing an injury on her finger but did not photograph it.

Knife Use Allegation

After the People rested, the public defender moved to dismiss the knife use allegation pursuant to section 1118.1 as to count 3. He claimed there was insufficient evidence that appellant used a knife to dissuade Rosa from

reporting the offense. The court struck the special allegation. It stated, "[t]he way the case was tried, the only dissuading was the breaking of the phone and statement after [appellant] broke the phone. There wasn't any knife around at that point. And the testimony was that the knife and beating . . . were separate from the dissuading . . . ."

In his closing argument, the prosecutor made numerous references to appellant's use of a knife in the commission of the offense. He outlined the elements of assault with a deadly weapon and told the jury it must determine whether appellant used a knife when he assaulted Rosa. As to count 3, the prosecutor argued that appellant's acts of choking Rosa, putting a knife to her throat and threatening her son all constituted acts of dissuasion.

DISCUSSION

Dissuading a Victim

Appellant contends that his conviction on count 3 (dissuading a victim) should be reversed because section 136, subdivision (b)(1) does not criminalize attempts to prevent another from reporting a crime that has not yet occurred. He claims he broke the cell phone before he assaulted Rosa, thus the statute is inapplicable, and his conviction must be reversed.

Section 136.1, subdivision (b)(1) provides that every person who attempts to prevent or dissuade another person who has been a victim of or witness to a crime "from [m]aking any report of that victimization to any peace officer or state or local law enforcement officer . . . is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison."

"'[I] n construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. [Citation.]'" (*People v. Arias* (2008) 45 Cal.4th 169, 177.) We look first to the statutory language, giving the words their plain and ordinary meaning. (*People v. Superior Court (Zamudio)* (2000) 23

Cal.4th 183, 192.) Consideration is given to both the statute's legislative history and "the wider historical circumstances of its enactment . . . ." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) Appellant's argument is not a direct challenge to the statutory language. Rather, he contends that the statute should specify the sequence in which the criminal acts and the act of dissuasion must occur.

Appellant's argument fails. Section 136.1 has been held to fall within the "continuous conduct exception," because the statute contemplates a series of acts committed over a period of time, rather than a specific criminal offense. (*People v. Salvato* (1991) 234 Cal.App.3d 872, 882 [defendant's series of verbal and written threats to former wife punishable under § 136.1]; See also *People v. Thompson* (1984) 160 Cal.App.3d 220, 224 [repeated acts of spousal battery constitute continuous conduct punishable under § 273.5].) The language of section 136.1 emphasizes an "unlawful goal or effect, the prevention of testimony, rather than on any particular action taken to produce that end. 'Prevent' and 'dissuade' denote conduct which can occur over a period of time as well as instantaneously." (*People v. Salvato*, *supra*, at p. 883.)

In *People v. Foster* (2007) 155 Cal.App.4th 331, 337, we previously held that section 136.1 was enacted to expand prosecution for a variety of intimidating acts which had eluded coverage under the former statute. The legislative history underlying section 136.1 makes clear that the legislative objective is to broaden the protections available to crime victims and "to expand the coverage of the law prohibiting the intimidation of witnesses." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2909 (1979-1980 Reg. Sess.) as amended on April 9, 1980, p. 2.)

Appellant had continuously abused Rosa and previously threatened to harm her son if she reported his conduct to the authorities. Within this ongoing cycle of abuse, appellant broke Rosa's cell phone, telling her it was to

prevent her from calling the police. This constituted an act of dissuasion punishable under section 136.1, subdivision (b)(1).

Knife Use Allegation

Appellant was originally charged with assault with a deadly weapon, a knife. (§ 245, subd. (a)(1).) The jury found him not guilty, and convicted him instead of the lesser offense of simple assault (count 1, § 240). A knife use allegation (§ 12022, subd. (b)(1)) was made as to the remaining two counts, corporal injury to a child's parent (count 2, § 273.5, subd. (a)) and dissuading a witness (count 3, § 136.1, subd. (b)(1)). The jury found the knife use allegation not true as to the count 2. The court dismissed the knife use allegation as to count 3.

Appellant contends that his conviction on count 3 should be reversed because it is unclear whether the jury based its verdict on the knife use allegation, which was dismissed, or the act of breaking the phone. He alleges that the jury was led to believe it could base a conviction on count 3 on the knife use, because the prosecutor argued in closing that appellant used a knife in his effort to dissuade Rosa from reporting the offense.

We reject this argument. The jury was required to consider whether a knife was used because appellant had been charged with assault with a deadly weapon (ADW), and a knife use allegation was made as to count 2. The jury returned a verdict finding appellant not guilty of ADW. It also found that the knife allegation in count 2 to be not true.[2] The knife use allegation was dismissed as to count 3, and the jury was not asked to decide whether appellant used a knife in this count. As was noted by the trial court in dismissing the allegation, the evidence presented was that the knife was used in the course of the assault, rather than to dissuade the victim from reporting. In light of these

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[2] The jury was instructed with the knife use allegation only as to count 2 (CALCRIM No. 3145).

factors, the only basis upon which the jury could have found appellant guilty of dissuasion was his breaking of the cell phone.

Double Jeopardy

The federal and state Constitutions prohibit placing a person in double jeopardy for the same offense. (U.S. Const., 5th Amend.; Cal. Const., art. 1, § 15.) Appellant argues that the prosecutor's references in closing argument to the knife use in count 3 constituted a retrial of the dismissed sentencing enhancement and is barred by the Double Jeopardy Clause of the Fifth Amendment.

Appellant claims that, despite the dismissal of the knife use allegation in count 3, the prosecutor alleged in his closing argument that appellant dissuaded Rosa from calling the police by hitting her, choking her, putting a knife to her throat, squeezing her mouth and threatening harm to her son in El Salvador. Appellant maintains that by combining each event into a single act of dissuasion, he was tried twice on the dismissed knife use allegation.

This argument is without merit. Appellant was tried only once on the knife use allegation attached to count 3, which was dismissed after the prosecution completed its case-in-chief. The jury was therefore never asked to make a finding regarding the knife use allegation attached to count 3. Nor has appellant been punished based on this allegation.

Prior Inconsistent Statements

At an Evidence Code section 402 hearing, defense counsel moved to exclude as hearsay proposed testimony regarding Rosa's prior statements. Appellant claims the court abused its discretion by admitting evidence of the victim's prior statements without considering whether they were inconsistent with her trial testimony. Appellant further argues that Rosa's prior statements provided the "primary support" for the existence of the cell phone, and it is

reasonably probable the jury would not have convicted appellant in the absence of Rosa's prior statements.

The court ruled that Rosa's statements were sufficiently evasive to be admitted as prior inconsistent statements. It stated, "for the record her statements are sufficiently evasive. It's just hard for the court to imagine that she could go through an incident sustaining the types of injuries that she sustained, especially the visible bruises to her wrists and some of the bruises to her face and the red marks on her neck, and remember as little about it as she claims. I just find that shocking." It added that "[s]he had plenty of reasons to be evasive. She was evasive. The inconsistent statements are admissible. [¶] If the jury finds that she wasn't evasive and she really didn't remember, then they can't consider those statements against [appellant]. So that's ultimately their decision. [¶] But . . . the statements themselves are admissible."

Evidence Code section 1235 provides that "[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with [Evidence Code] section 770." The statute provides that a statement made by a witness that is inconsistent with his testimony may be admitted if the witness was given the opportunity while testifying to explain or deny the statement. (Evid. Code § 770, subd. (a).) We review the trial court's ruling on the admissibility of evidence for an abuse of discretion. (*People v. Vieira* (2005) 35 Cal.4th 264, 292.)

Appellant's argument fails because the trial court expressly stated that Rosa's statements were evasive. Moreover, the court is not required to make explicit findings of inconsistency when ruling on the admissibility of evidence under Evidence Code section 1235. (*People v. Ledesma* (2006) 39 Cal.4th 641, 710.) "'A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless

required by statute.' [Citations.]" (*Ibid.*, quoting Evid. Code, § 402, subd. (c).) "[W]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. . . . [Citation.]" (*People v. Ledesma, supra*, at p. 711.)

There was a reasonable basis in the record to support the trial court's implied finding that Rosa's prior statements were inconsistent. (See *People v. Ledesma, supra*, 39 Cal.4th at p. 711.) She had numerous reasons to be evasive about her prior statements detailing the assault. Although she was the victim of domestic violence at appellant's hands, she subsequently reunited with him. They moved together to the state of Washington where they had another child. Rosa testified that she did not want appellant to be prosecuted and that she was brought to trial in Los Angeles "by force." There was no abuse of discretion.

Because Rosa's prior statements were properly admitted, it is unnecessary to consider appellant's argument that the alleged error was "compounded" by instruction with CALCRIM Nos. 226 (witness credibility) and 318 (prior statements as evidence). Nor need we consider appellant's claim of cumulative error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Frederick N. Wapner, Judge

Superior Court County of Los Angeles

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